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No. 01-1859

In the

Supreme Court of the United States

RONALD P. WHITE, *PETITIONER*,

v.

STATE OF SOUTH CAROLINA, *RESPONDENT*.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether South Carolina's statute prohibiting lay people from injecting ink/dye under the skin of other people violates the First Amendment's free speech protection?

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STATEMENT OF THE CASE

In 1966, the South Carolina Legislature enacted S.C. Code §16-17-700 (Supp. 2001), making it unlawful for any person to "tattoo" the body of another person. The statute was amended in 1986 to allow a licensed physician or surgeon to tattoo part of a patient's body if in his medical opinion, it was necessary when performing cosmetic or reconstructive surgery. Violation of the statute is a misdemeanor, punishable by a discretionary fine and/or incarceration up to one year.

In 1999, the Petitioner Ronald P. White ("White") participated in a television news program on the subject of tattooing. He was shown in the broadcast applying a tattoo to the arm of another man, and was subsequently arrested for violating §16-17-700.[1]

At trial, White admitted knowingly violating the statute. He conceded there are public health and safety risks associated with tattooing, which constitutes a legitimate state interest. He further admitted he did not know anything about the risks associated with "nonprofessional" tattooists, but contended that he followed all "appropriate" safety precautions. (R., pp. 27-30).[2] In the face of his admission regarding the health risks associated with tattooing, White presented no evidence, other than his own self-serving testimony regarding his safety precautions, and that of another tattooist with no medical training, regarding the health

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[1]White contends that his arrest is the only arrest under the statute since it was enacted in 1966. (Petition, p. 6). The only cited support for that contention is a statement by counsel that he was personally unaware of any other arrests.

[2]Record cites are to the Record on Appeal filed with the South Carolina Supreme Court.

and safety issues, or the extent to which "appropriate" safety precautions abated those concerns.

White conceded that he could use other mediums, such as oil and acrylic paint on canvas, to create pictures, but stated that those mediums are "saturated, " and "commonplace," and he could not make any money doing them. He admitted that he could commute approximately an hour from his home to open his own tattoo shop in another state (North Carolina), but testified that he chose not to do so because he did not want to spend that time in an automobile. (R., pp. 34-37).

White argued that the statutory lay tattooing ban impermissibly restricted his free speech rights under the federal and state constitutions, restricted interstate commerce, and violated the Privileges and Immunities Clause of the federal constitution. The trial court found that the act of tattooing was not speech, and even if it was, the statutory ban was a valid exercise of South Carolina's police power in light of the impact on public health and safety.[3] As to White's other claims, the trial court held that the legislature can use appropriate means to regulate or prohibit any occupation to protect public health and safety, and that all contract and property rights are subject to the fair exercise of the state's police powers.

The trial court found White guilty as charged, and sentenced him to one year imprisonment and a $2,500 fine, suspended to five years probation and a $500 fine. White

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[3]White contends the trial court found that he "had engaged in a creative, artistic endeavor." (Petition, p. 6). The referenced transcript pages were not included in the record before the South Carolina Supreme Court, and therefore, are not appropriate for citation before this Court. Since those pages are not in the appellate court record, the Court cannot determine the text, or context, of the trial court's actual statements.

appealed, and the South Carolina Supreme Court heard oral argument on November 14, 2001.

On appeal, White abandoned his interstate commerce and privilege and immunities claims, and only contended that the statute impermissibly restricted his freedom of speech rights under the federal and state constitutions. The premise of his argument was that the "process" of applying a tattoo cannot be separated from the display of the tattoo, and therefore, both are protected as "art" under the First Amendment. (Pet. App., pp. 1a-3a).

By opinion filed March 4, 2002, the Supreme Court affirmed White's conviction, holding that the "process" of injecting dye to create a tattoo under another person's skin is not sufficiently communicative to warrant constitutional protection as "speech," symbolic or otherwise, and to outweigh the risks to public safety. In response to White's contention that "tattooing" is "art," which is entitled to the same protection as painting, writing or sculpting, the Court found that the activity of injecting dye under the skin is unique since it involves invasion of human tissue, and therefore, it may be subject to state regulation, including an outright ban, to which other "art" forms, on non-human mediums, may not be lawfully subjected. Noting that White bore the burden to establish by a clear showing that the statute violated some constitutional provision, the Court found that White had not shown why the process of injecting ink/dye under the skin to create a tattoo, with the inherent health risks, fell within the First Amendment.[4] (Pet. App., pp. 3a-7a)

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[4]In his dissent, Justice Waller concluded that by creating words, pictures, or images on the bodies of his customers, White intended to convey a message which was likely to be understood by viewers, and therefore, his conduct in creating the tattoos was entitled to the same constitutional protections as any other form of "art." Based on newspaper articles, Justice Waller concluded that the "more modern trend" indicates tattoos should be

The Court then examined whether the statute was arbitrary, with no reasonable relationship to the protection of health, welfare and safety of citizens, and found that White had virtually conceded there was a rational relationship between "tattooing" and public health. In light of that concession, and in the absence of any evidence to the contrary, the Court held that the statute was a reasonable exercise of the state's power to protect the health, welfare and safety of its citizens. (Pet. App., pp. 7a-9a).

White's request for rehearing was denied by unpublished order dated March 21, 2002. On June 19, 2002, White filed a Petition for Writ of Certiorari in this Court, which was docketed on June 21, 2002.

REASONS FOR DENYING THE PETITION

I. There is No Conflict Among Lower Courts Regarding the Question Presented in this Case.

White contends that since tattooing constitutes dissemination of the resulting art, the South Carolina Supreme Court's decision in this case conflicts with decisions from other courts holding that the dissemination of protected art is itself protected. White cites only three cases allegedly conflicting with the decision in this case, one of which is distinguishable, and the other two are not binding authority, even in the state in which they were issued.

In *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996), the Second Circuit determined that a city regulation prohibiting the plaintiffs from selling their artwork in public areas violated

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protected as "speech," and the state's efforts to restrict it should be subjected to a higher level of scrutiny. (Pet. App., pp. 9a-13a).

the First Amendment, holding that the sale of protected material was also protected. Significantly, the method used to produce the protected material was not at issue, and the court specifically found that "the street marketing is in fact a part of the message of appellants' art." *Id.* at 696. Thus, in accordance with *Spence v. Washington*, 418 U.S. 405 (1974), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the court looked for, and found, an intent to convey some message, even though not a "particularized" one.

In addition, the Second Circuit recognized that not all visual expression is protected under the First Amendment. Notably, the court cited *Yurkew v. Sinclair*, 495 F.Supp. 1248 (D.Minn. 1980), for the proposition that tattooing is conduct which falls outside of the First Amendment's protection. *Id.* In this case, the South Carolina Supreme Court also cited *Yurkew* as support for its conclusion that tattooing is unprotected conduct. (Petitioner's Appendix, pp. 3a-4a).

Comparison of the conduct in *Bery* and this case is truly an example of comparing apples to oranges. The conduct at issue in *Bery* (the public sale of artwork) is obviously different from the invasive procedure of injecting ink/dye under human skin to form a permanent image. There are no health concerns associated with the former, but White concedes there are inherent health risks associated with the latter. States have constitutionally viable authority to enact legislation protecting the health of their citizens. The New York regulations at issue in *Bery* were aimed at street congestion problems rather than health concerns, while South Carolina's tattoo statute is aimed directly at health and safety issues.

White also cites two Massachusetts lower court decisions declaring that Massachusetts' statutory lay tattooing ban was unconstitutional. *See Lanphear v. Massachusetts*, Case No. 99-

1896-B (Sup. Ct. Suffolk County 2000); *Massachusetts v. Meuse*, Case No. 9977-CR-2644 (Sup. Ct. Essex County 1999). Notably, neither of these decisions was reviewed by Massachusetts' appellate courts, and therefore, they do not constitute binding authority in that state, or present a conflict that requires this Court's intervention.[5]

Except for the two Massachusetts lower court decisions discussed above, every court that has examined the issue of whether the tattooing process is protected under the First Amendment, including the South Carolina Supreme Court in this case, has determined it is not, and accordingly, that states can validly ban the practice. *See Yurkew*, *supra* (practice of tattooing not entitled to First Amendment protection because it is not a "'significant medium for the communication of ideas,'" nor a medium that "'may affect public attitudes and behavior'") (quoting *Joseph Burstyn, Inc.*, 343 U.S. at 501); *State Medical Licensing Bd. of Indiana v. Brady*, 492 N.E.2d 34, 39 (Ct. App. 1986) (process of tattooing is neither speech, nor even symbolic speech, entitled to constitutional protection); *People v. O'Sullivan*, 96 Misc.2d 52, 409 N.Y.S.2d 332, 333 (N.Y. App. Div. 1978) (tattooing is not speech or symbolic speech, and defendant may not escape valid regulation by labeling his art form symbolic speech). Other courts have held that prohibitions of lay tattooing, such as that at issue in this case, are a legitimate exercise of the states' police power, and directly advance the states' interest in protecting the health, safety and welfare of their citizens. *See Kennedy v. Hughes*, 596 F.Supp. 1487, 1494-95 (D.C. Del. 1984) (ordinance prohibiting lay tattooing without licensed physician in attendance served a valid purpose in light of known health risks associated with the process, and was rationally related to the government's purpose of protecting public health);

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[5]Counsel has been unable to locate any appellate court decision holding that the act of tattooing is protected under the First Amendment.

Golden v. McCarty, 337 So.2d 388, 390 (1976) (due to the nature of tattooing, a restriction that tattooing be done by a person licensed to practice medicine or dentistry, or under his direction, bears a substantial relationship to public health, and is reasonable); *Grossman v. Baumgartner*, 17 N.Y.2d 345, 218 N.E.2d 259, 261-262 (1966) (in light of connection between tattooing and hepatitis, prohibition of lay tattooing was justified and reasonable).[6] Thus, there is no conflict among the lower courts regarding a state's authority to ban lay tattooing that warrants review by this Court, and the Petition should be denied.

II. The South Carolina Supreme Court Decision Does Not Conflict with this Court's First Amendment Decisions.

White argues the South Carolina Supreme Court's holding that "artistic expression" is protected only if sufficiently imbued with elements of communication to qualify as expressive conduct, conflicts with this Court's decisions holding that artistic expression is protected by the First Amendment. He asserts that this Court "has always protected art as art, without regard to whether it is also 'symbolic speech.'"

1. As the party raising a facial constitutional challenge to the statute at issue, White bears a "heavy burden." *National*

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[6]Even if, as White asserts, these states now allow lay people to engage in the occupation of tattooing, that does not equate with a recognition that the act of tattooing is protected speech. Rather, it merely reflects those states' decisions, for whatever reason, to allow the practice by lay people as well as licensed medical professionals. Those decisions do not mandate a similar decision by the State of South Carolina. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995) (one state's decision to permit brewers to disclose alcohol content on beer labels does not preclude neighboring states from effectively banning the disclosure of such information within their borders).

Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998). Facial invalidation is "strong medicine," which the Court has used "sparingly and only as a last resort," *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601 91973); *see also Clark v. Community for Non-Violence*, 468 U.S. 288, 293, n. 5 (1984) (the person seeking to engage in assertedly expressive conduct bears the obligation to demonstrate that the First Amendment even applies; otherwise, the rule would become that all conduct is presumptively expressive). White has failed to meet his burden in this case.

Initially, this Court has never held that merely labeling a particular mode of expression as "art" automatically entitles it to First Amendment protection. White cites *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), as support for such a holding. Examination of that case, and the cases cited therein, however, reveals that the Court was addressing the government's attempts to suppress "expression about philosophical, social, artistic, economic, literary, or ethical matters." *Id.* at 231 (emphasis added). In other words, the government sought to ban particular speech and/or conduct based on its content, not the medium used to express it. Even the obscenity jurisprudence White cites goes to "content" based infringements that are not at issue in this case.

It is undisputed that South Carolina's tattoo statute is not directed at the tattoo image, or any message the wearer seeks to convey by having it. Rather, it goes only to the act of injecting ink/dye under the skin to create that image, and imposes rational limitations regarding which people are allowed to do so.

White's argument essentially equates "artistic expression" with the method used to create an image. Accepting his argument would result in the protection of any process, or materials, someone chooses to use in the course of his "artistic expression," regardless of associated risks.

For instance, if a person decides that animal sacrifice is part of his "artistic expression," a state's animal cruelty laws would become subject to strict scrutiny as restrictions on free speech. This Court has never adopted such a wide ranging interpretation of the First Amendment's scope. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68, n. 15 (1973) (few could seriously claim that statutes outlawing bearbaiting, cockfighting, and other brutalizing animal sports, violate the First Amendment or any other constitutional provision). Rather, this Court has expressly acknowledged that while virtually every activity contains some expressive component, not all conduct can be labeled "speech" for First Amendment purposes. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570 (1991) (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

Assuming that the images created through the "tattooing" process are "art," White conceded at trial that he could create his "art" on canvas, rather than human tissue. (R. pp. 34-36). Further, body "art" can be created with body paint or henna, which are not prohibited in South Carolina. Even though such body images are not permanent, they are nonetheless ways that White could create his "art" without violating South Carolina law.

White points to the long history of tattooing, and its growing cultural acceptance, as grounds for affording the tattoo process itself constitutional protection. That history is irrelevant to the issue before the Court in this case. Obscenity has a long history as well, and it now seems to be more culturally accepted, but this Court has never hesitated to hold that obscenity, in <u>any</u> medium, is not entitled to First Amendment protection. *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution.") (citations omitted).

2. White also argues that the South Carolina Supreme Court erred in applying the test established in *Spence v. Washington*, 418 U.S. 405 (1974), to determine if the process of applying a permanent tattoo by injecting ink/dye under human skin is entitled to First Amendment protection. He contends that in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), this Court held the *Spence* test does not apply to "artistic expression."

Contrary to White's contention, *Hurley* involved the clearly symbolic speech of participating in a parade, not 'artistic expression," and it did not declare the *Spence* test inapplicable. Rather, it merely clarified that a "narrow, succinctly articulable," or "particularized," message is not a condition of constitutional protection. 515 U.S. at 569.

The gist of the *Hurley* holding is that some intent to convey a message, even if not a narrow or particularized one, is required before First Amendment protection attaches. In holding that the First Amendment allowed organizers of the Boston St. Patrick's Day parade to ban participants based on their "message," the Court stated: "the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day." *Id.* at 574 (emphasis added). In short, some "message" was required before the First Amendment applied.

Similarly, White overstates the holdings of other cases he cites as support for his broad proposition. None of those cases involved the issue of whether in and of itself, the "act" of engaging in "artistic expression" is protected under the First Amendment. Rather, each case dealt with forms of human expression that are either readily apparent as means of

communication (music, dance, literature, theater, fine arts), or recognized as a "significant medium for the communication of ideas" (motion pictures). *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (constitutionality of restrictions on federal grants to state arts agencies, symphony orchestras, opera associations, dance theater foundations, and fine arts museums); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music is one of oldest forms of human expression, which has the capacity to appeal to the intellect and emotions, and rulers have censored it to serve needs of the state); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (motion pictures are "a significant medium for the communication of ideas," and important as an "organ of public opinion"). Simply stated, the "act" of injecting ink/dye under another person's skin is neither 1) readily apparent as a means of communication, 2) a significant medium for communicating ideas, nor 3) a "uniquely valuable or important mode of communication." *See City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (residential signs are a "venerable means of communication that is both unique and important").[7]

Citing dicta from various decisions by this Court, White argues there is "lingering uncertainty" regarding the extent to which "art" is protected by the First Amendment. Rather than creating uncertainty, however, existing jurisprudence provides the fluid guidelines vital for application to a myriad of factual situations. White seeks a bright line rule to the effect that

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[7]Cases invalidating complete bans on certain methods of communication have focused on the significance of the particular method of communication at issue, and turned on whether the regulation at issue "eliminated a common means of speaking." *City of Ladue*, 512 U.S. at 55; *see also Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981) (live entertainment); *Martin v. City of Struthers*, 319 U.S. 141, 145-49 (1943) (door-to-door distribution of literature); *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (handbills on public streets); *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (distribution of pamphlets).

anything labeled an "art form," or "artistic expression," is automatically entitled to First Amendment protection. Such a rule would fly in the face of well-established law requiring the person challenging a statute to present evidence that the expression at issue is protected, and create the exact presumption of constitutional protection this Court declined to create in *Clark*. 468 U.S. at 293, n.5.

As the Second Circuit noted in *Bery*, while courts may struggle with determining exactly what expression is encompassed within the First Amendment, such decisions are not impossible under existing law. 97 F.3d at 696. The fact that various courts have already addressing the exact issue presented in this case, and decided it adversely to White, reveals that the existing jurisprudence is sufficient to allow for reasoned analysis and decisions.

Merely labeling conduct as "artistic expression" does not entitle it to First Amendment protection. *See Barnes*, 501 U.S. at 578 (Scalia, J., concurring opinion) (unless the purpose of a law is to directly or indirectly impede speech, the First Amendment is not implicated simply because the law incidentally impacts expressive conduct); *People v. O'Sullivan*, 409 N.Y.S.2d at 333 (merely labeling tattooing as an "art form" does not entitle it to constitutional protection). Many would, and do, undoubtedly call obscenity "artistic expression," but it is well established that obscenity in any form is not constitutionally protected. The South Carolina Supreme Court properly applied the *Spence* test to determine whether White's "conduct" of injecting ink/dye under the skin of another person warranted constitutional protection, and correctly concluded that the "act" of tattooing another person was not sufficiently expressive conduct to fall within the First Amendment's protection.

White presented no evidence that the "act" of injecting ink/dye under the skin to form a permanent image is, or ever has been, an important or significant method of communicating ideas. On the contrary, as discussed above, virtually every court that has considered this issue has determined it is not. Therefore, White failed to meet his "heavy burden" to show that the statute is facially unconstitutional, there is in fact no basis for constitutional protection of this "act," and the Petition should be denied.

3. Even if this Court determines that the "act" of applying a permanent tattoo by injecting ink/dye under the skin is a form of "expression" entitled to some First Amendment protection, the statute at issue is still valid under existing First Amendment jurisprudence. "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." *Clark*, 468 U.S. at 293 (emphasis added). Such restrictions are valid if they are justified without reference to the content of the speech, they are narrowly tailored to serve a significant governmental interest, and they leave open alternative channels for communication of the information. *Id.*; *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 289-301 (2000) (prohibition of nude dancing was a valid, content neutral regulation, aimed at the secondary impact on the public health, safety and welfare, with incidental impact on any expressive element of the conduct); *Barnes* 501 U.S. at 565-572 (1991) (statute banning public nudity was valid, content neutral, exercise of state's authority to provide for public health and safety); *O'Brien*, 391 U.S. at 376-77 (when speech and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on free speech protection); *In Re Antonio O.*, 83 Cal.App.4th 1029, 100 Cal.Rptr.2d 218, 222-23 (Ct. App. 2000) (even if tattoos constitute speech under the First Amendment, prohibiting juvenile from getting additional tattoos as a condition of

probation, which focused on the manner in which a message is conveyed rather than the message, was a reasonable, content neutral, restriction on free speech rights).

It is undisputed in this case that South Carolina's tattooing statute is absolutely content neutral, and that the State has a significant interest in protecting the health and safety of its citizens, as well as the constitutional authority to enact legislation to further that interest. White concedes there are health risks directly related to tattooing, but contends those risks are vague and undefined. Contrary to White's contention, the health risks associated with tattooing are specific, and recognized by major health organizations, including the Food and Drug Administration ("FDA"), the Centers for Disease Control ("CDC"), and the American Red Cross.

As of November 29, 2000, the FDA lists the transmission of infectious diseases, such as hepatitis, removal problems,[8] allergic reactions, development of granulomas, and keloid scar formation, as primary complications associated with tattooing. FDA Fact Sheet, *Tattoos and Permanent Makeup* (Nov. 29, 2000).[9] Significantly, the FDA notes that "[e]ven if the needles are sterilized or never have been used, it is important to understand that in some cases the equipment that holds the needles cannot be sterilized reliably due to its design." *Id.*

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[8]Clearly, as the number of tattoos grows, the number of people seeking to have them removed, and the problems associated with removal, will grow as well.

[9]White asserts that the FDA does not regulate tattooing "in light of the success of [local] regulations. (Petition, p. 4). The FDA Fact Sheet does not address the purported "success" of local regulations, but merely acknowledges that local laws and regulations exist, and states that the FDA "has not attempted to regulate the use of tattoo inks and the pigments used in them and does not control the actual practice of tattooing."

(emphasis added). Thus, even with the most stringent sterilization requirements, there is still a significant risk of transmitting diseases through the process of tattooing.

The FDA also indicates that another health concern associated with tattooing is the variety of pigments and diluents used in the process, many of which are not even approved for skin contact, much less injection into the skin. The Fact Sheet further notes that some pigments are "industrial grade colors that are suitable for printers' ink or automobile paint." Id.; *see also* FDA - CDRH Device Advice, *Tattoo Equipment and Dyes* (August 17, 2001) (FDA's major concern is the safety of dyes and pigments used in tattooing).[10]

The health risks associated with injecting something akin to automobile paint under the skin are self evident, and cannot be eradicated with even the most stringent licensing and sterilization requirements. Clearly, a licensed physician, applying a tattoo he deems to be medically necessary, is better equipped to weigh the potential risks, and monitor potential complications from the procedure.

The CDC also acknowledges the potential risk of disease transmission through tattooing. CDC Fact Sheet, *HIV and Its Transmission*, (July 1999) (while there are no documented cases of HIV transmission through tattooing, the hepatitis B virus has

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[10]It does not appear that the long term effects of having these dyes and pigments injected under the skin has ever been studied or determined. In addition, modern removal techniques include laser treatments that essentially break the pigment down so that it can eventually be absorbed or removed through the body's immune system. *FDA Fact Sheet*; *see also Tattoo Removal FAQs* (available at tat2begone.com/htdocs/faqs.htm). There is no data regarding the health risks associated with having the equivalent of automobile paint floating around in the body, or even if it can be absorbed or removed by the immune system.

been transmitted through the process). The risk of potential disease transmission is so great that the American Red Cross prohibits blood donations for a full year after the donor receives a tattoo. American Red Cross, *Blood Donation Eligibility Guidelines* (Revised June 27, 2002) (available at www.redcross.org/services/biomed/blood/learn/eligibl.html). One health organization determined that "people who received tattoos from commercial tattoo parlors were nine times more likely to be infected with the hepatitis C virus than people who didn't have any tattoos." Southwestern Medical Center Health Watch, *Tattoo Dangers*, (May 14, 2001) (available at www3.utsouthwestern.edu/library/consumer/tattoodangr.htm) (emphasis added). *See also* Jennifer Morrison, *Tattoos Draw Health Alert*, Toronto Sun, July 19, 2001 (health officials worried about growing risk of being infected with hepatitis C while getting a tattoo) (available at www.canoe.ca/Health0107/19_tattoos-sun.html).

White himself admitted in an interview with Circle Magazine that several tattoo equipment companies increase the health risks associated with tattooing by selling equipment "to anyone, regardless of whether or not they have a license, or have presented evidence that they are otherwise qualified to apply a tattoo in any way." John Plummer, *Testing the First Amendment & Tattoo Law I*, Circle Magazine (available at www.circlemagazine.com/testingthefirst.html). Thus, according to White, even putting licensing requirements in place will not alleviate the health concerns associated with the process of tattooing.[11]

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[11]White disputes the level of health risks, and contends that the risks can be controlled through regulation, but presented no credible evidence on that issue at trial. Making such a determination is inherently within the province of the legislature, and to date, South Carolina's legislature, which reviewed the tattooing statute during the last four legislative sessions, has determined the health risks are still sufficiently great that the best way to

South Carolina's tattooing statute is narrowly tailored to serve the State's significant interest in protecting the health and safety of its citizens. It only prohibits lay people from engaging in one very specific method of applying body art - injection of ink/dye under the skin, which has proven health risks, while leaving available all other methods of creating body art. There are viable alternative channels for communicating any information and/or ideas White, and all others similarly situated, may wish to convey through body art. Thus, even if the Court determines that the tattooing "process" is entitled to some First Amendment protection, South Carolina's statute is constitutionally sound, and the Petition should be denied.

III. This Case Does Not Present Any Question of Exceptional Importance Warranting Review by the Court.

Granting review in this case will not serve to resolve any issue of "exceptional importance."[12] South Carolina has not banned an entire "art form." Assuming for purposes of argument that there is "art" at issue, it is "body art," which can be accomplished in mediums that do not involve significant health risks (body paint and henna), and are not banned by the statute. The only thing the statute prohibits is the act of injecting ink/dye under the skin by someone who is not a licensed physician.

None of the cases White cites as authority for granting certiorari on an issue of "exceptional importance" involve a process requiring the invasion of human tissue, with recognized

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control them is to continue banning lay tattoos. See Note 13, below.

[12]The small number of cases to date involving "tattooing," combined with White's assertion that forty-eight states now allow the practice, clearly indicate that the issue in this case is not "exceptional."

health risks, as a form of "expression." Contrary to White's assertions, South Carolina has not attempted to prohibit all expression through body art, and there is no ban on the wearing of body art, even permanent tattoos, in South Carolina. All the State has done is prohibit the injection of ink/dye under the skin by anyone other than a licensed physician doing it for medical reasons.

White, and any other lay person, is free to create "body art" in South Carolina using any medium other than the injection of ink/dye under the skin, and White is free to work as a tattooist in any of the forty-eight states that now apparently allow lay tattooing. Further, South Carolinians are free to wear, and display, even permanent tattoos that are applied outside of South Carolina. Therefore, the effect of a decision in this case would be minimal at best.

White has not even alleged that he was attempting to convey a message, particularized or general, through his tattoos. In fact, the testimony clearly revealed that his interest in tattooing is purely commercial. He admitted he is capable of painting in other mediums, he is licensed to give tattoos in North Carolina and various other states, and he has had the opportunity to work in "several very reputable tattoo shops." Even though White professed to have such a passion for tattooing, however, he admitted that he is unwilling, not unable, to travel in a car for the hour travel time required for him to work in North Carolina. (R., pp. 16-18, 34-37).

Finally, the record in this case is insufficient for any meaningful review of the merits. White devotes significant portions of his Petition to describing facts about tattooing – its history, popularity, demographics, and regulations. (Pet., pp. 3-5, 10-11, 17). Yet none of that discussion is based on evidence in the record. Indeed, other than his own self-serving testimony

regarding the statute's effect on his life, and the testimony of another tattooist who does not even live in South Carolina, White presented no evidence regarding the statute's impact on the "art" of tattooing. In particular, while admitting there are health risks associated with the practice of tattooing, White presented no credible evidence regarding how those risks can be alleviated, or indicating that South Carolina's statute is directed at anything other than those risks.

Any lay "tattooist" is free to create "body art" in South Carolina using any medium other than the injection of ink/dye under the skin, or to go to any of the forty-eight states that apparently have decided to allow non-medical people to do so. South Carolina's decision to prohibit lay tattooing directly involves an issue of public health and safety, which is clearly within the State's authority to regulate, even to the extent of banning it. Simply stated, there is no question of "exceptional importance" in this case that warrants review by this Court, and the Petition should be denied.[13]

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[13]Not only will the effect of review in this case be nominal nationally, it is possible that it would not have any lasting effect in South Carolina. The South Carolina legislature has considered revisions to the statute at issue in recent years, and a proposal to significantly revise it almost passed during the 2002 legislative session. *See* S.C. Senate Bill No. 0049 (2001-2002) (available at www.leginfo.state.sc.us). A similar proposal is anticipated during the 2003 legislative session.

CONCLUSION

Based on the foregoing, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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